Yusof bin Ahmad & Ors v Hongkong Bank (Singapore) Ltd & Ors

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 878 OF 1988
CHAN SEK KEONG J
5 APRIL 1990

Trusts and Trustees — Duties of trustees — Failure to carry out duties — Application to court to remove trustees — Whether failure to carry out duties justify their removal by court — Duty to comply with settlor's wishes and terms of trust

Trusts and Trustees — Removal of trustees — Application to court — Grounds justifying removal by court

This action was commenced by the plaintiffs, who are income beneficiaries of the family settlement, for the purpose of removing the then existing trustees, the first defendants herein, as trustees of the family settlement and the appointment of another trustee in their place. The first defendants had applied to be discharged as trustees and to have the second, fourth and fifth defendants appointed as trustees in their place. The court made an order in that summons discharging the first defendants as trustees of the family settlement and appointing the plaintiffs' choice of trustees in their place (see [1989] 3 MLJ 84). The parties now require the court to determine whether the parties to the original action are entitled to have their costs of the action up to 23 January 1989 when S/C No 443/89 was filed, and if so, against whom and on what basis. This requires the court to decide whether the first defendants ought to have been removed on the grounds relied on by the plaintiffs.

Held, finding that there were grounds justifying the removal of the first defendants as trustees:

(1) The acts or omissions which are sufficient for the removal of trustees must be such as to endanger the trust property, to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.

(2) The only serious complaint in this case is that the first defendants as trustees of the family settlement refused to take on the trusteeships of the relation settlement and the charity settlement as required under cl 13 of the family settlement. The first defendants have failed to justify their failure to carry out the directions of the settlor in cl 13. Their refusal to comply with cl 13 was contrary to the wishes of the settlor and was a breach of duty.

(3) It is fundamental that a trustee must carry out the terms of the trust. If he fails to do so, he may be removed as trustee by a court even if no harm has been done to the beneficiaries or to the trust. Another way of looking at this issue is to consider whether the court would have appointed the first defendants as trustees if they had made it a condition that they would not act as trustees of the two related settlements if another trust corporation had been nominated who would have been prepared to undertake the trusts of the three settlements. The court would not have appointed the first defendants as trustees on their terms if another suitable trust corporation had been available.

(4) If the first defendants had not voluntarily agreed to retire as trustees of the family settlement, the court would have removed them as trustees for refusing to comply with cl 13 of the family settlement. They must then pay the costs of the plaintiffs.

(5) However, in view of the fact that the plaintiffs have only succeeded on one out of many complaints, the plaintiffs should only be entitled to one quantum of the costs of this action.

(6) The second to sixth defendants are not entitled to costs from any party or from the family settlement, even if the plaintiffs had failed in this action. Their intervention in the proceedings were superfluous. For the same reason, they do not have to pay the costs of the plaintiffs in these proceedings.

[*Editorial Note*: The second to sixth defendants have appealed to the Court of Appeal vide Civil Appeal No 33 of 1989.]

Cases referred to

1 *Yusof bin Ahmad bin Talib* v *Hongkong Bank Trustee (Singapore) Ltd & Ors* [1989] 3 MLJ 84 (refd)
2 *Letterstedt* v *Broers* (1884) 9 AC 371 (refd)
3 *Palairet* v *Carew* (1863) 55 ER 222 (folld)

Aloysius Leng for the plaintiffs.
Koh Juay Kherng for the first defendants.
J Parker QC (*Anand Karthigesu* with him) for the second to sixth defendants.
TPB Menon for the seventh to ninth defendants.

Cur Adv Vult

Chan Sek Keong J: This action was commenced on 8 August 1987 by the plaintiffs, who are income beneficiaries of the family settlement, for the purpose of removing the then existing trustees, viz Hongkong Bank Trustee (Singapore) Ltd ('HBT'), the first defendants herein, as trustees of the family settlement and the appointment of British and Malayan Trustees Ltd ('BMT') in their place. On 23 January 1989, HBT applied by S/C No 443 of 1989 to be discharged as trustees and to have the second, fourth and fifth defendants appointed as trustees in their place. On 31 March 1989, I made an order in that summons discharging HBT as trustees of the family settlement and appointing BMT in their place (see [1989] 3 MLJ 84). The said second, fourth and fifth defendants have appealed against that order.

Issue

The issue as to whether HBT ought to have been removed on the grounds relied upon by the plaintiffs was not argued in S/C No 443 of 1989. The parties now require the court to decide the said issue for the purpose of determining whether the parties to the original action are entitled to have their costs of the action up to 23 January 1989 when S/C No 443/89 was filed, and if so, against whom and on what basis.

Plaintiffs' grounds

The grounds relied upon by the plaintiffs for the removal of HBT as trustees are set out in the affidavit of the second plaintiffs filed on 16 January 1990. The plaintiffs have alleged that HBT have failed to do the following things as trustees of the family settlement:

(1) to act as trustees of the relation and the charity settlements in breach of the terms of the family settlement;
(2) to inform the beneficiaries of the terms and fees of their appointment as trustees;
(3) to act properly in relation to the distribution of income from the Australian investments in repatriating overseas income to Singapore and thereby subjecting non-resident beneficiaries to Singapore tax, and also promptly in regard to the same;
(4) to avoid incurring unnecessary expense in the administration of the family settlement, eg in making police report against the defaulting trustees on the 'loss' of interest income which were intended for distribution to the Muslim poor;
(5) to make the correct deductions for withholding tax in respect of the income for the year 1986;
(6) to take into its safe custody some trust documents;
(7) to take prompt control of two Australian companies which belonged to the family settlement and the mortgages in favour of the previous trustees;
(8) to invest the trust funds in authorized investments in Australia and to disclose to the beneficiaries the advice of Queen's Counsel on how to deal with the Australian investments;
(9) to remit the sum of US$477.77 to a beneficiary, as a result of which he was paid five months late;
(10) to avoid incurring unnecessary expense in taking advice from solicitors on a claim involving $371;
(11) to compute correctly the estate duty payable on the estate of one of the deceased's beneficiaries, viz Fatimah, resulting in the estate duty being reduced, after the intervention of the plaintiffs;
(12) to hold an even hand amongst the beneficiaries by discriminating against the family members of two former trustees, Hussein and Mustapha.

I do not find it necessary to review the evidence in respect of all the above complaints. Many of these were trivial complaints. Some of them were exaggerated complaints which were, no doubt, contributed to a certain extent by the excessive caution and delays on the part of HBT. One of them had nothing to do with the administration of the family settlement except that it was construed as putting obstacles in the way of a beneficiary from recovering a sum of money owing to him by the settlement.

The thrust of the second complaint was not the failure to disclose the terms and fees of HBT's appointment as trustees, but that the amount of fees charged by HBT was excessive. No doubt the plaintiffs considered that they did not get good value for the fees charged by HBT, but this cannot be a ground for removal since the fee structure (including the item on discretionary fees) was approved by the court and it has not been argued that the court had no jurisdiction to approve the fee structure. If the fees charged were excessive, it is not a ground for removing the trustees unless they amount to fraudulent charging, but a ground for recovery of such fees by the new trustees.

I find that the first part of the third complaint is not a breach of trust but a breach of duty, if any, to non-resident beneficiaries for which they have their remedy against HBT. The second part of the third complaint has some substance as HBT have not given a satisfactory explanation why they, as professional trustees with all the legal and accounting services available to them, took more than three years to get ready to distribute all the income. However, no appreciable loss has resulted to the settlement.

However, I find that the fourth, fifth, sixth, ninth, tenth and eleventh complaints have no substance.

With reference to the seventh complaint, that the delay in taking control of the Australian companies contributed to the delay in the distribution of the Australian income, I am of the view that here HBT should and could have acted much more promptly than they had actually done, given the circumstances leading to the discharge of the previous trustees and their appointment as trustees. Their justification was that the situation was uncertain and they were waiting for legal advice. In my view, professional trustees in the position of HBT do not need to rely on legal advice for everything that they have or may desire to do. Taking into custody and control in order to safeguard the assets of the family settlement trust is an obvious duty and function to perform, which they do not have to wait for or require legal advice, especially in the circumstances of this case. HBT have adduced no evidence that they had made any or adequate assessment as to whether it was safe to leave the Australian mortgages in the control of the defaulting trustees for such a long time.

In respect of the eighth complaint, I find that the complaint that the investments in Australian shares were unauthorized was an unfair complaint in view of the ambiguity of the court order which authorized HBT to invest in Australian equities. Moreover, there is no duty on the part of HBT to inform the beneficiaries as to what counsel had advised them to do in respect of such investments.

In my view, all the above complaints, collectively, would not have been sufficient as grounds for the removal of HBT as trustees. As was stated in *Story's Equity Jurisprudence*, s 1289 which was cited with approval by the Privy Council in *Letterstedt* v *Broers*:[1]

> ... it is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.

Clause 13 of the family settlement

In my view, the only serious complaint in this case is that HBT as trustees of the family settlement refused to take on the trusteeships of the relation settlement and the charity settlement. The complaint is that HBT committed and continued to commit a breach of their duties as trustees under cl 13 of the family settlement which provides as follows:

> It shall be the duty of the trustees for the time being to accept and undertake the trusts declared in an indenture dated 6 October 1932 (Registered Volume 830 No 121) and made between the settlor of the one part and the settlor and Shaik Jaafar and Shaik Abdullah of the other part and if any of the trustees refuses to be appointed trustee of the said indenture or to accept and undertake when appointed the trusts of the last mentioned indenture he shall not be entitled to any share in the trustees' commission under cl 12 hereof until he shall consent to become and be appointed as such trustee.

The indenture dated 6 October 1932 is the relation settlement, which was a settlement of the income of certain properties for the benefit of the relations of the settlor described therein. Subsequently, by a supplemental indenture dated 31 August 1935, cl 13 of the family settlement was amended to impose on the trustees the duty to accept and undertake the trusts declared and contained in an indenture dated 7 August 1935, (this being the charity settlement which was a settlement of the income of certain properties for certain named charitable objects). There was an obvious reason for the settlor to require that the three settlements be administered by the same set of trustees. All the settlements provide for termination of the income trusts on the same date, whereupon the corpus of each of the settlements would vest in the income beneficiaries under the family settlement then living in the same shares as enjoyed by them immediately before such date.

It is equally clear from the terms of cl 13 that, by imposing a deterrent against a failure to perform such duty, the settlor considered the common trusteeship of the three settlements as a most important duty on the part of the trustees of the family settlement. Clause 13 provides that if any of the said trustees refuses to be appointed as a trustee of the relation settlement and the charity settlement, he shall not be entitled to any share in the trustees' commission under cl 12 of the family settlement until he shall consent to become and be appointed as such trustee.

In view of this clear provision, it might appear surprising that HBT chose to refuse to comply with it. I turn now to the reasons given by them for not doing so.

Originating Summons No 1269 of 1985

HBT were appointed as trustees of the family settlement by an order of court made on 5 September 1986 ('the supplemental order') in Originating Summons No 1269 of 1985 in which the said plaintiffs were the second to sixth defendants in the action before me. This order of court has to be read together with a previous order of court made in the same proceedings on 22 July 1986 ('the preliminary order') as it was supplemental to the earlier order. It is necessary to set out below the relevant provisions of these two orders as their effect is a matter of controversy between the plaintiffs and HBT and has a bearing on the reasons for HBT's refusal to comply with cl 13 of the family settlement.

Order of court dated 22 July 1986

1 The plaintiffs have leave to amend the originating summons herein in accordance with the copy thereof annexed hereto and marked 'A'.
2 The first, second and third defendants (hereinafter called 'the defaulting trustees') be removed as trustees of the above-mentioned settlement (hereinafter called 'the settlement') with immediate effect.
3 A trust corporation carrying on business in Singapore (to be agreed between the plaintiffs and the defaulting trustees or in default to be nominated by the court and hereinafter called 'the new trustee') be appointed sole trustee of the settlement in place of the defaulting trustees such appointment to take effect immediately upon there being lodged in chambers an affidavit by an officer of the new trustee verifying its consent to act as such trustee as aforesaid and containing or exhibiting particulars of its current scale of charges for acting as trustee and the new trustee shall until further order be entitled to charge and be paid for acting as such trustee as aforesaid in accordance with such scale of charges.
4 [Vesting order.]
5 (1) [All documents of settlement to be handed to Drew & Napier who were appointed with immediate effect as the attorneys of the settlement for the purpose of effecting compliance with paragraph.]
(2) [Drew & Napier to have full access to the office of the settlement and to all the contents thereof and to remove same, etc.]
6 [Defaulting trustees to co-operate fully with Drew & Napier and with the new trustee.]
7 [Defaulting trustees restrained from removing documents, etc.]
8 [Defaulting trustees to inform Drew & Napier by affidavit whereabouts of assets and restrained from removing same from jurisdiction except for authorized purpose.]
9 [Defaulting trustees restrained from leaving jurisdiction.]
10 [Defaulting trustees not entitled as a beneficiary under the settlement to receive any income, etc.]
[Other consequential orders.]

Order of court dated 5 September 1986

1 Hongkong Bank Trustee (Singapore) Ltd, a trust corporation within the meaning of the Trustees Act (Cap 40), is the duly appointed sole trustee of the above-mentioned settlement with effect from 28 August 1986.
2 All moneys, credits, properties, securities and other assets of the above-mentioned settlement of whatsoever nature and wheresoever situate (including choses in action) are vested in Hongkong Bank Trustee (Singapore) Ltd.
3 The costs of and incidental to this application be fixed at $500 and be paid out of the capital moneys of the settlement.

Paragraphs 1 and 2 of the preliminary order require an explanation. The proceedings were originally commenced against the defaulting trustees (who were then Hussein, Kamal and Mustafa) for certain declarations regarding the Australian investments made by them and for particulars and accounts of all moneys, investments and property subject to the trusts of the settlement. On the date fixed for hearing of the said action, ie 21 July 1986, Hussein and Kamal filed an affidavit admitting that one of the trustees, Mustapha, had misappropriated A$850,000 from the funds of the settlement, whereupon, on the next day, the said plaintiffs applied and were given leave by the court to amend the action to include a prayer in terms of para 2 of the preliminary order. The preliminary order was then made accordingly.

As a result of this unexpected turn of events, the family settlement was left with no trustees as from 22 July 1986. It was accordingly necessary to find a suitable trust corporation to take over the trusteeship of the family settlement. At that time, the said plaintiffs were advised by Drew & Napier and, as is evident from paras 5, 6, 7 and 8 of the preliminary order, the solicitors were given a major role in regard to the interim protection of the records and other papers of the family settlement. The solicitor in charge, acting as attorney of the settlement, interviewed officers from various trust companies in Singapore for the purpose of nominating them to be the trustees of the family settlement. However, it is also clear from his affidavit filed on 3 September 1986 in Originating Summons No 1269 of 1985 that he had already made up his mind to appoint HBT as trustees. In para 3, he deposed that the parties had agreed on 22 July 1986 to the appointment of HBT after he had rejected the nomination by counsel for the defaulting trustees, viz Standard Chartered Bank Trustee Singapore Ltd. BMT were ruled out as trustees on grounds which I have referred to in my judgment in S/C No 443 of 1989. It was on this basis that the said plaintiffs obtained a declaration that HBT were the trustees of the family settlement with effect from 28 August 1986 (the date on which they accepted appointment as trustees subject to their published terms and conditions as varied by a letter dated 22 August 1986 to Drew & Napier).

The charity settlement — Originating Summons No 415 of 1987

After their appointment as trustees of the family settlement, HBT took no steps to have themselves appointed as trustees of the relation settlement and the charity settlement and to take over the control and management of the assets of these two settlements. The said plaintiffs in Originating Summons No 1269 of 1985 did not appear to have considered that HBT were under an obligation to take over the trusteeship of the charity settlement as on 12 March 1987, they wrote to the defaulting trustees requesting them to step down as trustees and be replaced by the said plaintiffs. On 20 March 1987, one of the defaulting trustees, Kamal, replied that he was surprised by the request as his understanding was that upon his removal as a trustee of the family settlement, he had ceased to be the trustee of the charity settlement. He requested the said plaintiffs to contact HBT and Drew & Napier, to whom his reply was also copied.

There is no evidence as to whether HBT were contacted on this issue. However, the said plaintiffs commenced Originating Summons No 415 of 1987 for orders of court that the defaulting trustees be removed as trustees of the charity settlement and for themselves to be appointed in their place. One of the defaulting trustees, Hussein, filed an affidavit on 14 May 1987 in which he stated that he had consented to the appointment of HBT as trustees of the family settlement on the understanding that they would be trustees of the three settlements and that he would not have consented if he had known otherwise as that would have been contrary to the wishes of the settlor. He desired HBT to accept the said trusteeships.

The relation settlement — Originating Summons No 675 of 1987

By a letter dated 19 March 1987 from their solicitors to HBT, the second defendant (Murtadha) and the fourth defendant (Helmi) in the present proceedings pointed out to HBT that by virtue of cl 28 of the family settlement, HBT were deemed to be the trustees of the relation settlement. Nevertheless, the letter went on to inquire whether HBT would agree to act as trustees of the relation settlement or take steps to discharge themselves as trustees thereof. They also inquired whether HBT would be prepared to appoint them as co-trustees as they would be able to assist HBT in drawing up the annual list of beneficiaries under the relation settlement. On 9 April 1987, HBT replied, testily, that they had placed the matter before their solicitors. On 15 May 1987, the solicitors for Murtadha and Helmi wrote again to HBT pointing out the delay on the part of HBT in deciding what to do and also the possible prejudice to the beneficiaries of the relation settlement. HBT were given seven days to reply. HBT failed to reply and on 27 May 1987, a reminder was sent, whereupon on 28 May 1987, the solicitors for HBT replied that they were taking their clients' instructions. This was a rather curious reply as HBT had on 9 April 1987 said that they had placed the matter before their solicitors for an opinion. On 11 June 1987, Murtadha and Helm lost their patience and by their solicitors' letter of 11 June 1987 gave HBT's solicitors until 5pm the following day to reply, failing which court proceedings would be instituted for them to be appointed as co-trustees.

On 16 June 1987, the second, fourth and fifth defendants in the present action commenced Originating Summons No 675 of 1987 for a declaration that HBT were the

trustees of the relation settlement as from 28 August 1986, that they be removed as such trustees and that the said plaintiffs be appointed in their place. On 18 June 1987, the solicitors for HBT replied belatedly and enclosed a copy of a circular letter dated 6 June 1987 to all the beneficiaries of the family settlement. As this circular letter was the first time HBT made known their stand in relation to the relation settlement, I shall reproduce it in full below:

> Further to our report to you of 5 May 1987, we enclose a circular to you on the latest developments since 5 May 1987.
>
> (1) The relation settlement
>
> Please be informed that by the order of court dated 22 July 1986 made in consequence of Originating Summons No 1269 of 1985, Hussein Ahmad Salim bin Talib, Kamal bin Salim Talib and Mustafa bin Mohsin Talib were removed as trustees of the family settlement. As far as we know, the aforesaid persons are still the trustees of the relation settlement. We have been advised by our lawyers that although cl 28 of the relation settlement requires the trustees of the relation settlement to be the same persons as the trustees of the family settlement, the court has the jurisdiction to appoint other persons as trustees of the relation settlement.
>
> After perusing the obligations imposed upon the trustees of the relation settlement, we have decided that we shall not apply to the court to remove the existing trustees of the relation settlement and to have ourselves appointed in their place. We have been informed that Messrs Murtadha and Helmi Talib will be applying to court to remove the present trustees and have themselves appointed in their place.
>
> In the meantime, we have been receiving the rents from the properties of the relation settlement. We shall hold the said rents until we are requested to do otherwise by the trustees or the new trustees of the relation settlement.
>
> (2) The charity settlement
>
> On 21 May 1987, we were served with an order of court dated 18 May 1987 made in consequence of Originating Summons No 415 of 1987 which removed the aforesaid Hussein, Kamal and Mustafa as the trustees of the charity settlement and appointed Murtadha, Helmi and Ameen bin Ali bin Salim bin Talib as the trustees. Pursuant to the order of court, we have delivered the assets of the settlement to the lawyers acting for the new trustees.
>
> Do not hesitate to contact us if you should have any queries.

On 11 August 1987, HBT filed the affidavit of its trust officer, Foo Kok Hing ('FKH'), reiterating their decision not to take up the trusteeships of the relation settlement and the charity settlement. FKH also confirmed that as the defaulting trustees had 'abandoned' the relation settlement, HBT had been collecting the rents of the properties of the said settlement, and that HBT had only consented to be trustees of the family settlement.

On 12 August 1987, the plaintiffs in this action applied to be joined as defendants in the said proceedings. The second plaintiff filed an affidavit stating that he and his other beneficiaries were surprised by HBT's circular letter as it was their understanding that HBT would also be the trustees of the relation settlement, that they had on 11 June 1986 written to HBT, that HBT's stand was contrary to the settlor's direction in cl 28 of the family settlement and that they would procure another trust corporation to take over and administer the three settlements in place of HBT. In para 8 of the said affidavit, the second plaintiff expressed on behalf of the applicants their strong objection to the trusts of the three settlements being fragmented and administered separately, and in para 9 said that they had obtained the agreement of BMT to act as trustees of the three settlements. The stand of these beneficiaries was that HBT ought to be removed as trustees of the family settlement and that BMT be appointed as trustees of the three settlements.

As the letter of 11 June 1987 also has a bearing on the attitude of HBT, I will also reproduce it in full below:

> We the undersigned being beneficiaries of the Sallim Talib family settlement holding 4 1/2 shares out of 23 shares had met regarding your letter of 6 June 1987 and are most disturbed at your complete change of position as earlier stated in your letter of 5 May 1987 stating that you were obliged to be trustee of the relation settlement as well.
>
> We are also in further contact with overseas beneficiaries who are in agreement with us.
>
> You had acknowledged in your letter of 5 May 1987 that you were obliged under cl 28 of the relation settlement to be trustee of it as well. This was also accepted as the correct position by Helmi and Murtadha Talib. Further, you had collected all documents relating to this relation settlement.
>
> Your decision not to be appointed trustees for the relation settlement despite the settlor's direction that the trustees of the relation settlement to be the same persons as the trustees of the family settlement is therefore in total disregard of the settlor's direction. The old trustees had followed the settlor's direction until your appointment.
>
> We understand that when the old trustee, Hussein Ahmad Sallim Bin Talib, agreed to the plaintiffs in Originating Summons No 1269 of 1985 suggestion of yourselves being appointed trustees of the family settlement he did so on the understanding that you would also be trustees for all the three settlements. This is now no longer to be followed by you, contrary to this understanding with full knowledge of the terms of the three settlements.
>
> We therefore require that you take over as trustee of the relation settlement as well. Should you still not be inclined to do so, we wish to inform you that we have a trust corporation willing to take over and administer all these three settlements, family relation and charity in place of you.
>
> Please advise all interested persons of our letter and disclose this in all court proceedings.

It is to be noted that this letter refers to a change of position on the part of HBT as indicated in their letter of 5 May 1987. The relevant part of this letter reads as follows:

> III The relation and charity settlement
>
> As you may be aware, our appointment on 28 August 1986 as trustees of the main family settlement obliges us under cl 28 to be trustees of the relation settlement. On 20 March 1987, we received a letter from the solicitors of Murtadha and

> Helmi Talib expressing that they would like to be appointed co-trustees of the relation settlement and asking us if we had any objections. Again on 3 April 1987 the same persons wrote to us via their solicitors seeking our consent to their acting as sole-trustees of the charity settlement. In both cases we have not committed ourselves but have sought our lawyers' opinion on the implications before acting in the interest of the settlement.

After the said beneficiaries were joined as defendants in the said action, a number of other affidavits were filed by all the parties. These affidavits do not take the matter any further except that FKH's further affidavit of 20 January 1988 stated (in para 14(iii)) that the resolution of the dispute between the beneficiaries as to whom should be appointed trustees of the relation settlement was 'totally of no interest to' HBT. Paragraph 10 of the same affidavit also denied that HBT had failed to comply with the terms of the relation settlement as it had never consented to act as trustees of that settlement.

Originating Summons No 675 of 1987 was eventually fixed for hearing together with Originating Summons No 878 of 1987. Following the order I made in S/C No 443 of 1989, BMT were also appointed as trustees of the relation settlement.

To summarize the evidence as at 20 January 1988, HBT knew as far back as 5 May 1987 that they were 'obliged' to take up trusteeships of the relation settlement and the charity settlement. By 6 June 1987, HBT had made up their mind not to take up the trusteeship of the relation settlement. Nothing was said about the charity settlement. HBT have given three reasons for refusing the said trusteeship: firstly, they would have difficulty in administering the relation trusts and secondly, they had never consented to be the trustees, and thirdly, the court has jurisdiction to appoint other trustees to the said trusteeship.

In my view, all these reasons collectively do not justify the failure to carry out the directions of the settlor in cl 13 of the family settlement. It is axiomatic that a trustee must comply with the terms of the trust instrument. The only valid justification for HBT not complying with cl 13 of the family settlement is either that the court has expressly or impliedly exempted HBT from doing so or that the circumstances were such that it was either physically or legally impossible for them to comply with that provision. The first case amounts to a variation of the terms of the family settlement. The second is not the case for HBT. No submission has been made to me by counsel for HBT or counsel for the second to sixth defendants that the court when appointing HBT as trustees had expressly varied the terms of the family settlement.

However, counsel for HBT contended that there was an implied variation of cl 13 by the circumstance that HBT were appointed as trustees by the court and not pursuant to the family settlement and that their remuneration was not based on cl 12 of the family settlement which provides as follows:

> The trustees during the period of the settlement shall be entitled to charge and retain for themselves out of income as remuneration for their services a commission of five per cent of the gross income of the settled property but out of such commission they shall pay for the rent of an office and the wages or commission if any, payable to agents or clerks employed by them to collect rents and keep accounts. Such commission shall be divided equally between the trustees subject as hereinafter provided in cll 13 and 24 hereof and in case any trustee or trustees shall for the time being be disentitled to any share in the trustees' commission under cl 13 or 24 hereof the whole commission shall go to the other trustees or trustee hereof.

In my view, para 3 of the order of 22 July 1986 has superseded (but not abrogated) cl 12 to the extent that the court approved the appointment of HBT as trustees on terms of remuneration in accordance with their scale of charges. However, the circumstance that cl 12 does not apply to HBT does not mean that cl 13 also does not apply. Clause 13 is an independent provision and there is nothing in the terms of the preliminary order and of the supplemental order which expressly or impliedly varies or extinguishes the continuing operation of cl 13. This question did not come before the court in Originating Summons No 1269 of 1985. There was also nothing in the affidavit of the officer of HBT consenting to the appointment that HBT accepted appointment on the condition or provided that they would not be required to comply with cl 13 of the family settlement. The intention of the court must be considered against the background that the court was not and could not have been aware that HBT would not take up the trusteeships of the other two related settlements. On this basis when the court made the order of 22 July 1986, the inference must be that HBT were approved as trustees to carry out the terms of the family settlement. The suggestion, and this is what the argument of counsel for HBT amounts to, that the court appointed HBT as trustees with a view to not carrying out any of the terms of the family settlement is absurd.

Accordingly, I have no doubt that cl 13 of the family settlement has to be complied with and that HBT's refusal to comply with it was contrary to the wishes of the settlor. It was a breach of duty as cl 13 is expressed in terms of a duty. There is no evidence before this court as to when exactly HBT came to know of the provisions of the family settlement. But Drew & Napier, who were responsible for recommending HBT as trustees, had full knowledge of the terms of the family settlement. They seized the trust documents on the day the preliminary order was made. This court can only assume that the solicitor in charge must have briefed HBT about its terms before the actual appointment was made. In any case, even if he did not, HBT, as professional trustees, should have apprised themselves of the terms of the family settlement before they

agreed to act as trustees. Furthermore, they must have been aware of cl 13 when they took over the trusteeship. By May 1987, HBT had obtained legal advice that they were obliged to take up the trusteeships of the relation settlement and the charity settlement.

The law is plain. It is fundamental that a trustee must carry out the terms of the trust. If he fails to do so, he may be removed as trustee by a court even if no harm has been done to the beneficiaries or to the trust. In my view, another way of looking at this issue is to consider whether the court would have appointed HBT as trustees if they had made it a condition that they would not act as trustees of the two related settlements if another trust corporation had been nominated who would have been prepared to undertake the trusts of the three settlements. The answer is perfectly clear. The court would not have appointed HBT as trustees on their terms if another suitable trust corporation had been available. The same reasoning must apply in June 1987 when HBT refused to take up the trusteeships of the two related settlements and the plaintiffs were able to find another trustee corporation, viz BMT, who were prepared to do so.

In *Palairet* v *Carew*,[3] the defendant was one of the two trustees for sale of an estate, the produce of which was to be divided amongst persons sui juris. He refused to concur in a sale agreed upon by the beneficiaries until he had been furnished with deeds relating to another settlement (to which the court held he was not entitled). He also refused to retire from the trusts to facilitate the sale. In an action by the other trustees and the beneficiaries to remove, the court made the order with costs against him. In the course of his judgment, Sir John Romilly MR said (at pp 223 to 224):

> He declined to do this [ie concur in the sale] without seeing all the documents and papers relating to the other trusts, upon the ground that, if a trustee surrendered up a trust to a person who committed a breach of trust, he might be made liable for the consequences which might arise from the misconduct of the new trustee. That, no doubt, is correct to this extent: if a trustee be called upon to commit a breach of trust and refuses, and his cestuis que trust say, 'There is AB who will; will you resign and surrender your trust to him?' and the old trustee accedes to that proposal, and transfers the property to the new trustee, for the purpose of enabling him to commit a breach of trust, in that case the old trustee would probably be visited very severely by the court. But here the trustee is merely asked to perform the trust which he has undertaken, and which he refuses to do, and then he is asked to resign, in order that someone else may perform the trust which he has undertaken to perform and which he refuses to do, and thereupon, he still refuses either to perform the trust himself or to allow any other person to do it.
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> ...
>
> It is enough to say that it is the duty of the trustee to perform the trust which he has undertaken, and that if he compels his cestuis que trust to come to this court, to compel him to do so, he must take the consequences of not having performed his duty. Here it is obvious that the plaintiffs have shown very considerable forbearance, and have tried to avoid coming to this court.
>
> I have endeavoured to arrive at a conclusion which might relieve me for the necessity of making the defendant bear the costs of the suit, but I am of opinion that the defendant has rendered this suit necessary, and that he must pay the costs of it up to and including the hearing.
>
> I will appoint a new trustee and direct a conveyance, and then stay all further proceedings against him.

Counsel for the second to sixth defendants also contended that any failure to comply with cl 13 was not a ground for removal of HBT as trustees as the plaintiffs should have taken out a summons to clarify the position of HBT vis-a-vis the three settlements. In my view, this argument has no merit for two reasons. Firstly, there was no question that HBT did not know of their obligations under cl 13. They have admitted in May 1987 that they were obliged to comply with cl 13. Secondly, if they were in doubt about the ambit of the supplemental order of court, they should have sought clarification from the court. It was not the duty of the beneficiaries to clarify their rights and obligations for them. HBT were professional trustees who had access to the best legal advice that was available. They really have no excuse if they are now found to be in the wrong, as I find them to be.

Accordingly, I hold that if HBT had not voluntarily agreed to retire as trustees of the family settlement, I would have removed them as trustees for refusing to comply with cl 13 of the family settlement and appointed new trustees who were prepared to give effect to the wishes of the settlor. They must pay the costs of the plaintiffs. However, in view of the fact that the plaintiffs have only succeeded on one out of many complaints, I think that the plaintiffs should only be entitled to one quantum of the costs of this action.

As regards the costs of the second to sixth defendants, their counsel have contended that if the court finds for HBT, they are entitled to costs from the plaintiffs as they, having been instrumental in having HBT appointed as trustees, were entitled to be represented in these proceedings in order to protect the benefit of the appointment. I am unable to agree with this submission. HBT, as professional trustees, were perfectly capable of protecting their appointment as trustees. The second to sixth defendants' intervention in the proceedings to remove HBT as trustees were entirely superfluous. They are not entitled to costs from any party or from the family settlement, even if the plaintiffs had failed in this action. For the same reason, they do not have to pay the costs of the plaintiffs in these proceedings.

Order accordingly.

Solicitors: *Abraham Low & Partners; Lee & Lee; Tan Rajah & Cheah; Wee Swee Teow & Co.*

Reported by *Terence Tan Bian Chye*